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No. 98-457

In the Supreme Court of the United States

OCTOBER TERM, 1998

DAVID M. DALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
JAMES K. ROBINSON
Assistant Attorney General
KATHLEEN A. FELTON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

14pp

QUESTIONS PRESENTED

1. Whether the district court's error in failing to submit to the jury the element of materiality under 18 U.S.C. 1001 (1988) resulted in actual prejudice to petitioner sufficient to excuse his procedural default of that claim.

2. Whether the doctrine of *Teague* v. *Lane*, 489 U.S. 288 (1989), that new rules of criminal procedure are generally unavailable to prisoners seeking collateral review, applies to federal convictions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a13) is reported at 140 F.3d 1054. The district court's opinion (Pet. App. a14-a22) is unreported. The opinion of the court of appeals affirming petitioner's conviction on direct appeal is reported at 991 F.2d 819, and the district court's opinion denying petitioner's motions to dismiss is reported at 782 F. Supp. 615.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1998. A petition for rehearing was denied on June 18, 1998 (Pet. App. a23). The petition for a writ of certiorari was filed on September 16, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on one count of conspiracy to defraud the United States and to commit various tax and false statement offenses, in violation of 18 U.S.C. 371; one count of subscribing to a false tax return, in violation of 26 U.S.C. 7206(1); one count of attempted tax evasion and aiding and abetting that offense, in violation of 26 U.S.C. 7201 and 18 U.S.C. 2; one count of wire fraud and aiding and abetting that offense, in violation of 18 U.S.C. 1343 (1988) and 2; two counts of concealing facts by trick, scheme, and artifice and aiding and abetting that offense, in violation of 18 U.S.C. 1001 (1988) and 2; and one count of making false statements and aiding and abetting that offense, in violation of 18 U.S.C. 1001 (1988) and 2. Pet. App. a3. Petitioner was sentenced to 41 months' imprisonment on the conspiracy count, and concurrent prison terms of 30 months each on the other counts, to be followed by two years' supervised release. *Ibid.* He was also ordered to pay a $350 special assessment, a $675,000 fine, and a $58,000 assessment for costs of incarceration. *Ibid.* The court of appeals affirmed all convictions except one, and remanded for resentencing. *Ibid*; *United States* v. *Dale*, 991 F.2d 819 (D.C. Cir. 1993). This Court denied review. Pet. App. a3; *Dale* v. *United States*, 510 U.S. 1030 (1993).

In 1996, petitioner filed a motion under 28 U.S.C. 2255 (Supp. II 1996) to vacate his convictions. The district court denied the motion (Pet. App. a14-a22), and the court of appeals affirmed (Pet. App. a1-a13).

1. Petitioner and three other officers of Automated Data Management, Inc. (ADM) conspired to cause companies in Europe and Asia that they owned or con-

trolled to bill ADM for work that had not been done. They further conspired to deduct the payments made by ADM to the overseas companies as legitimate business expenses, thereby reducing ADM's tax liability. Petitioner and his co-conspirators were charged with tax fraud and related offenses for preparing ADM's false 1986 corporate tax return and for making false certifications to the Department of Defense concerning their interest in foreign companies. See Gov't C.A. Br. 2; 991 F.2d at 826-831.

With respect to the counts charging petitioner with false statements in violation of 18 U.S.C. 1001 (1988), the district court treated the issue of materiality as an issue for the court rather than the jury to determine. The court instructed the jury that the misrepresentations were material. Pet. App. a3. The jury found petitioner guilty on all counts. *Ibid.*

Petitioner challenged his convictions on direct appeal, but he did not claim that the district court erred in failing to submit the issue of materiality to the jury. See Pet. App. a3-a4; 991 F.2d at 831-839, 850-853. The court of appeals affirmed petitioner's convictions with one exception not relevant here and remanded for resentencing. Pet. App. a3; 991 F.2d at 858-859. This Court denied review. 510 U.S. at 1030. Petitioner was resentenced, and he did not appeal from the new sentence. Pet. App. a3-a4.

2. After petitioner's convictions became final, this Court held in *United States* v. *Gaudin*, 515 U.S. 506 (1995), that the Fifth and Sixth Amendments to the Constitution require the jury to determine the issue of materiality under 18 U.S.C. 1001 (1988). Petitioner subsequently filed a motion under 28 U.S.C. 2255 (Supp. II 1996) to vacate his convictions under 18 U.S.C. 1001 (1988), contending that the district court erred in failing

to require a jury finding of materiality. Pet. App. a4. The district court denied relief, holding that *Gaudin* established a new rule of criminal procedure that could not be applied retroactively to criminal convictions that were already final when this Court issued its decision. *Id.* at a14-a22.

The court of appeals affirmed, Pet. App. a1-a13, but on a different ground. Without reaching the retroactivity issue, the court of appeals held that petitioner was procedurally barred from raising the *Gaudin* error on collateral review. The court noted that, because petitioner had failed to raise the materiality issue at trial or on direct review, he was required to demonstrate both cause and actual prejudice in order to excuse his procedural default. Pet. App. a4 (citing *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982)). Noting that petitioner had "suggested no facts or theory to rebut the district judge's legal conclusion that the charged nondisclosures were material," the court of appeals concluded that petitioner had failed to establish that the district court's failure to submit the issue of materiality to the jury resulted in actual prejudice. Pet. App. a5.

The court rejected petitioner's contention that *Gaudin* error is per se prejudicial, entitling him to relief on collateral review notwithstanding his procedural default. The court noted that this Court held in *Johnson* v. *United States*, 520 U.S. 461 (1997), that a *Gaudin* error does not require reversal under the plain error standard when the defendant can present no plausible argument that the false statements are not material. The court of appeals reasoned that "the same error can in similar circumstances be nonprejudicial under the *habeas* standard which requires a showing of prejudice that is significantly greater than that neces-

sary under the more vague inquiry suggested by the words plain error." Pet. App. a6 (internal quotation marks omitted).

Judge Henderson concurred in the majority's holding that petitioner had not demonstrated actual prejudice. Judge Henderson also would have held that *Gaudin* established a new rule of constitutional procedure that did not apply retroactively to petitioner's convictions. Pet. App. a8-a12.

ARGUMENT

1. Petitioner challenges (Pet. 10-16) the court of appeals' holding that he was procedurally barred from raising his *Gaudin* claim on collateral review, because he failed to show that the district court's *Gaudin* error caused him actual prejudice. The court of appeals correctly resolved that issue, and it does not warrant further review.

Petitioner failed to raise his claim that the district court was required to submit the issue of materiality to the jury either at trial or on direct review. Petitioner was therefore precluded from raising his claim on collateral review, unless he could establish both that there was sufficient cause for his procedural default and that the error caused him actual prejudice. *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982). As the court of appeals concluded, petitioner failed to make a showing of prejudice under that standard.[1] In particular, because the district court found that petitioner's false statements were material and petitioner "suggested no facts or theory" to rebut that finding, Pet.

[1] The court of appeals did not reach the issue whether petitioner had shown "cause" for his default, see Pet. App. a5 n.4, but it is clear that he could not meet that burden either. See *Bousley* v. *United States*, 118 S. Ct. 1604, 1611 (1998).

App. a5, petitioner failed to establish that the district court's error caused him actual prejudice.

Petitioner argues (Pet. 10-14) that the failure to submit the question of materiality to the jury is structural error that is not amenable to harmless error review and that there is a conflict in the circuits on that issue. On October 13, 1998, this Court granted review to resolve the conflict identified by petitioner. *Neder* v. *United States*, No. 97-1985 (granting certiorari on the question whether "the trial court's failure to instruct the jury on the materiality element in this case was harmless error because materiality was not in dispute at trial"). There is no reason, however, to hold this case pending the resolution of that conflict. The conflict identified by petitioner concerns whether harmless error analysis applies when the defendant objects at trial to the court's failure to submit the issue of materiality to the jury and then raises the issue on direct review. Petitioner, by contrast, failed to raise the error he now asserts either at trial or on direct review. Instead, he raised his claim of error for the first time on collateral review. In those circumstances, the question is not whether a *Gaudin* error is subject to harmless error analysis, but whether petitioner has made the kind of showing of actual prejudice that would excuse his procedural default—a showing that is far more difficult for a defendant to make than that required to obtain reversal of a conviction on direct appeal. See *Frady*, 456 U.S. at 166-168.

Petitioner also contends (Pet. 14-16) that a *Gaudin* error constitutes per se actual prejudice under *Frady*, entitling him to reversal of his conviction notwithstanding his procedural default. As the court of appeals noted (Pet. App. a5-a6), this Court rejected a similar contention in *Johnson*. There, the Court held that a

defendant who did not object to a district court's failure to submit materiality to the jury was not entitled to a reversal of his conviction on direct appeal under the plain error standard where the defendant could make no plausible claim that his false statements were not material. 520 U.S. at 470. Although *Johnson* relied on the fourth prong of plain error analysis (whether the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings" (*ibid.*)), and this case involves the prejudice prong under *Frady*, a similar analysis applies in both contexts. Since petitioner did not raise his claim either at trial or on direct appeal, and he has suggested no plausible basis for a finding that his false statements were not material, he is not entitled to relief on collateral review. Indeed, since a defendant seeking to obtain relief on collateral review must ordinarily make a substantially greater showing than that required to obtain relief under the plain error standard (*Murray* v. *Carrier*, 477 U.S. 478, 493-494 (1986); *Frady*, 456 U.S. at 166; *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977)), that conclusion would seem to follow *a fortiori* from this Court's decision in *Johnson*.

Petitioner contends (Pet. 14) that the decision below conflicts with *Waldemer* v. *United States*, 106 F.3d 729 (7th Cir. 1996). But that case predated this Court's decision in *Johnson*, and the Seventh Circuit has not revisited the question since *Johnson*. In any event, the decision in *Waldemer* does not conflict with the decision below. In holding that a *Gaudin* error required setting aside a defendant's conviction on collateral review, the Seventh Circuit emphasized that no finding of materiality had been made by either the district court or the jury. 106 F.3d at 732, 735-736. The court expressly distinguished a prior Seventh Circuit case

holding that a *Gaudin* error did not constitute plain error on the ground that the district court in that case had made a finding of materiality. *Id.* at 732. Since the district court in this case made a finding of materiality, *Waldemer* is inapposite here.

2. Petitioner contends (Pet. 16-20) that the Court should grant review to decide whether the principle of *Teague* v. *Lane*, 489 U.S. 288 (1989)—that new rules of criminal procedure are generally not retroactive to cases on collateral review—applies to federal as well as state convictions. The court of appeals in this case, however, did not hold that petitioner was barred by *Teague* from seeking collateral relief. The court instead held that petitioner procedurally defaulted on his claim by failing to raise it at trial or on direct appeal. Cf. *Lambrix* v. *Singletary*, 520 U.S. 518, 524-525 (1997) (in federal habeas, procedural default should generally be resolved before addressing *Teague* issues). This case therefore does not present the question whether *Teague* applies to federal convictions.

In any event, petitioner's claim that *Teague* does not apply to federal convictions is without merit. Although *Teague* involved a state habeas petitioner, the same finality considerations that animated that decision apply equally to federal convictions. Indeed, the plurality's analysis in *Teague*, 489 U.S. at 311-316, drew largely on Justice Harlan's opinion in *Mackey* v. *United States*, 401 U.S. 667, 675-702 (1971) (concurring in the judgments in part and dissenting in part), a federal habeas case in which Justice Harlan stated that no distinction should be drawn, "for retroactivity purposes, between state and federal prisoners seeking collateral relief." 401 U.S. at 681-682 n. 1. This Court has rejected the claim that it should distinguish between federal and state prisoners when applying the

procedural default limitations on the scope of habeas relief, on the ground that "the Federal Government, no less than the States, has an interest in the finality of its criminal judgments." See *Frady*, 456 U.S. at 166. And, as petitioner concedes (Pet. 17), this Court's recent holding in *Bousley* v. *United States*, 118 S. Ct. 1604, 1609-1610 (1998), that *Teague* does not apply to rulings that decide the substantive meaning of a federal statute rests on the understanding that the *Teague* standard is applicable to federal convictions.

The courts of appeals, moreover, have consistently held that *Teague* applies to federal as well as to state prisoners. *United States* v. *Martinez*, 139 F.3d 412, 416 (4th Cir.), petition for cert. pending, No. 98-5677; *United States* v. *Swindall*, 107 F.3d 831, 834 n.4 (11th Cir. 1997); *Van Daalwyk* v. *United States*, 21 F.3d 179, 181-183 (7th Cir. 1994); *Gilberti* v. *United States*, 917 F.2d 92, 94-95 (2d Cir. 1990). The reasoning of those courts is sound. "[T]he primary reason for restricting collateral review—the goal of finality—is common to both federal and state applications." *Gilberti*, 917 F.2d at 94. And "[a] consistent and principled approach to retroactivity requires that all questions of retroactivity be resolved by reference to one standard." *Van Daalwyk*, 21 F.3d at 183. Petitioner's contention that *Teague* does not apply to federal convictions therefore does not warrant review.[2]

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[2] As Judge Henderson concluded (Pet. App. a8-a12), *Gaudin* is a new rule of criminal procedure within the meaning of *Teague*, and therefore does not apply to convictions like petitioner's that were final at the time of the decision. Every court of appeals that has addressed the question has reached the same conclusion. *Bilzerian* v. *United States*, 127 F.3d 237, 240-241 (2d Cir. 1997), petition for cert. pending, No. 97-1892; *United States* v. *Shunk*, 113

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
KATHLEEN A. FELTON
Attorney

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F.3d 31, 34-37 (5th Cir. 1997); *United States* v. *Swindall*, 107 F.3d at 836.